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Truth, Justice, and the Libertarian Way(s)

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TRUTH, JUSTICE, AND THE LIBERTARIAN WAY(S)

GARY LAWSON*

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INTRODUCTION

More than twenty years ago, I was commissioned to write an article – my very first scholarly article – on “the ethics of insider trading” (this was hot on the heels of the Ivan Boesky insider-trading scandal of the mid-1980s).¹ After tracing philosophical debates concerning the morality of exchanges based on unequal information from Cicero and Aquinas through Henry Manne and Frank Easterbrook,² I had to decide what I could responsibly say in a scholarly work as a matter of substantive moral theory about the practice of insider trading – and derivatively what it would be appropriate to say normatively in future scholarly work about any other subject.

My answer in 1988 was “almost nothing,”³ which after a few years in the academy I slightly amended to “absolutely nothing,”⁴ and I have ever since steadfastly stood by that answer. I said in 1992, and still believe today, that “[i]f one cannot provide a rational grounding for one’s normative claims, it is hard to see what purpose they serve;”⁵ and I said in 1988, and still believe today, that a rational grounding for normative claims requires “an integrated, validated philosophical system . . . down to the level of metaphysics”⁶ One is unlikely to see any such thing in a law review article, and certainly not in a law review article written by me. Accordingly, throughout two decades of

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¹ See Gary Lawson, *The Ethics of Insider Trading*, 11 Harv. J.L. & Pub. Pol’y 727, 727 (1988).

² See *id.* at 734-40.

³ See *id.* at 775-83.

⁴ See Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 57 n.16 (1992).

⁵ *Id.*

⁶ Lawson, *supra* note 1, at 777.

academic work, I have striven as hard as I can to avoid interjecting normative theory of any kind into my scholarship because I do not think that I can defend my moral positions with the kind of analytical rigor that is appropriate to the academic enterprise. Over a cup of tea among friends (or enemies), I am happy to hold court about how ethical egoism is the only objectively true moral theory and libertarian anarchism the only objectively just political arrangement. In professional legal scholarship, not so much.

In this article, I am going to break more than twenty years of silence on moral and political theory to comment on Michael Sandel's outstanding book *Justice: What's the Right Thing to Do?*⁷ The book is a clarion call for reflection on and discourse concerning basic moral issues. More to the point, it is a call directed at *citizens* rather than *academics*, on the premise that moral theory is something within the reach, and more importantly within the responsibility, of every person. That is a very difficult call to ignore. Accordingly, in the spirit of Professor Sandel's remarkable book (and even more remarkable intellectual life), I offer the following observations – *as a citizen rather than as an academic*. I claim no expertise in the subject matter; I am no more professionally qualified to speak on moral or political theory than I am to speak on cosmology or cosmetics.

In decidedly unprofessional fashion, I want to offer a clarification of, a criticism of, and a cheer for Professor Sandel's book. The clarification concerns the mission that Professor Sandel appears to have set for himself in this book, the criticism (and several additional accompanying clarifications) concerns Professor Sandel's treatment of libertarianism as a theory of justice, and the cheer concerns Professor Sandel's ultimate elevation of the good over the right. Whatever else about which Professor Sandel and I disagree – and that is just about everything, from the morality of familial obligations⁸ to whether Shakespeare is aesthetically superior to professional wrestling⁹ – we

⁷ MICHAEL J. SANDEL, *JUSTICE: WHAT'S THE RIGHT THING TO DO?* (2009).

⁸ Professor Sandel presents as an anguishing moral dilemma whether David Kaczynski should have alerted the police that his brother was likely the Unabomber. *See id.* at 239-40. If someone actually considers that to be a close, anguishing case, I do not want that person anywhere near my kids. If my brother was the Unabomber, I would turn him in, agitate for the death penalty, and volunteer to pull the switch. More generally, while parents have a limited obligation to care for children who they put into a position of (temporary) dependence by bringing them into the world, children have no unchosen obligations to take care of parents, siblings, or other relatives. It took Hank Rearden about nine hundred pages to figure that out, but he eventually got there. *See* AYN RAND, *ATLAS SHRUGGED* 898-906 (1957). To be sure, there are reasons grounded both in biology and in the economics of information why one might adopt a presumption in favor of people to whom you are "close" (either genetically, relationally, or geographically), but it is only a presumption.

⁹ With respect to the choice among Shakespeare, *The Simpsons*, and professional wrestling, *see* SANDEL, *supra* note 7, at 54-55: I have never watched *The Simpsons*, but I will match the classic soliloquies of Nature Boy Ric Flair and (the sadly late) Macho Man Randy Savage against Hamlet any day.

agree that any sound theory of justice has to be grounded at some level in a prior theory of human virtue. We disagree about the content of the underlying theory of virtue, the directness of the relationship between virtue and rights, and the political conclusions that flow from a virtue-grounded theory of justice, but on the grand stage of contemporary moral theory that is, as the old joke goes, just haggling about the price.

I. CLARIFICATION: BELIEVING AND KNOWING

The title of Professor Sandel's book is "Justice: What's the Right Thing to Do?" With all due respect, the subtitle is a bit misleading. A more apt title, given the design and focus of the book, would be: "Justice: What Do *You Think* Is the Right Thing to Do?" Professor Sandel's book is a simply splendid vehicle for identifying and clarifying a person's beliefs, exploring the implications of those beliefs, and situating the beliefs within established traditions of moral theory. It is a wonderful tool for self-reflection. But does it actually say anything, or even purport to say anything, substantive about "the Right Thing to Do?"

At first glance, the answer(s) would seem pretty clearly to be "no." Indeed, Professor Sandel says flat-out that his book's goal is "to invite readers to subject their own views about justice to critical examination – *to figure out what they think, and why.*"¹⁰ That is a very noble goal indeed, but it focuses on identifying beliefs rather than identifying whether those beliefs constitute knowledge.

On a second glance, however, Professor Sandel seems to want to do more than help people clarify their views. He writes: "How, then, can we reason our way through the contested terrain of justice and injustice, equality and inequality, individual rights and the common good? *This book tries to answer that question.*"¹¹ To reason your way through terrain presumably means to find better rather than worse answers, which presupposes some standard for distinguishing better from worse. But Professor Sandel does not set forth and defend objective criteria for moral truth from which one could determine better and worse answers to concrete questions. True, he takes the reader on a journey through some of history's leading moral theories, at least some of which – utilitarianism and Kantianism, for example¹² – claim to have objective foundations for morality. But Professor Sandel's guidance consistently draws attention to the *consequences and implications* of various moral positions, rather than the objective truth of their foundations, with a steady stream of examples, conundrums, and dilemmas serving to help people sharpen their intuitions and examine the principles underlying them. That does not necessarily help anyone sort out true beliefs from false ones. If there is any kind of standard external to beliefs actually held by people that can be used to

¹⁰ *Id.* at 30 (emphasis added).

¹¹ *Id.* at 28 (emphasis added).

¹² *Id.* at 106-08.

measure those beliefs, sharpening and clarifying actual beliefs is epistemologically pointless without specification of that external standard.¹³

Professor Sandel is acutely aware of this obvious problem and devotes significant space to it. I truly wish that I could reproduce his discussion in full, but he describes the essence of the problem as follows:

If moral reflection consists in seeking a fit between the judgments we make and the principles we affirm, how can such reflection lead us to justice, or moral truth? Even if we succeed, over a lifetime, in bringing our moral intuitions and principled commitments into alignment, what confidence can we have that the result is anything more than a self-consistent skein of prejudice?¹⁴

Precisely. Professor Sandel's "answer is that moral reflection is not a solitary pursuit but a public endeavor,"¹⁵ requiring input and response from others, even if the "others" are hypothetical interlocutors or long-dead historical figures.¹⁶

But how is that an answer? How does conversation (real or imagined) with others turn belief into knowledge? Indeed, might not the intervention of others lead us farther away from rather than closer to truth?¹⁷ More to the point, how can we even tell in what direction we are headed unless we know what a true moral proposition looks like – and what makes it true?

One answer is to say that there is no external standard, independent of the actual beliefs held by people after some particular amount of reflection with themselves and others, by which moral truth can be assessed. On this view, moral reasoning just is, unavoidably, working through the implications of actually-held beliefs in a process of reflective equilibrium. There simply is not anything else to know.

If that is indeed Professor Sandel's view, he is in good company across a wide spectrum. Richard Posner, for example, has said that "what is desired in an ethical theory . . . is not a basis for abandoning those fundamental ethical precepts that all of us accept, if not always obey, but rather a structure which organizes our intuitions and provides guidance in dealing with ethical issues where our intuitions are uncertain."¹⁸ And John Rawls constructed the most acclaimed political theory in modern times by taking certain firmly-held – or at least firmly-held-by-Ivy-League-leftists – convictions as the presumptively

¹³ I said a lot more about this point back in 1988, and I have nothing to add to that discussion today. See Lawson, *supra* note 1, at 777.

¹⁴ SANDEL, *supra* note 7, at 28.

¹⁵ *Id.*

¹⁶ *Id.* at 29-30.

¹⁷ I can just imagine a gaggle of liberal law professors collectively engaged in a process of reflective equilibrium leading each other to all manner of conclusions. But I'd rather not.

¹⁸ Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 111 (1979).

correct lodestars of moral reasoning.¹⁹ From what little I know of contemporary moral theory, intuitionists and coherentists seem to rule the roost pretty much across the board.

My point is not that there is anything fundamentally wrong with a reflective, intuitionist, constructivist, and/or coherentist approach to moral theory. That would require a demonstration of the truth of foundationalism, which is simply not happening here. My aim is simply to highlight – and thus to clarify – the point that constructivist methodologies contribute to truth only on an understanding of “truth” that may be considerably at odds with how ordinary citizens rather than many philosophers today view truth. There is accordingly a danger of equivocation when the target audience is citizens rather than philosophers. I have no scientific evidence to support this claim, but I strongly suspect that when normal people say or hear that something is “right,” they understand that to be an objectively verifiable command or obligation, derivable either from some religious tradition or from the nature of man as a distinctive species. They do not understand it to describe what Harvard professors would conclude after an especially long faculty meeting. When one announces something as the “right” thing to do, one needs to be very explicit about what kind of epistemological claim one is making.

II. CRITICISM: LIBERTARIANISM(S), OWNERSHIP, AND DESERT

Libertarians, one might think, would be flattered that Professor Sandel devotes a chapter to their views,²⁰ treating libertarianism on a par with heavy-hitting moral theories like utilitarianism and Kantianism. One might think that they would be especially grateful to Professor Sandel for their inclusion given his eminently thoughtful and fair-minded treatment of libertarian views – something that libertarians emphatically do not take for granted in academic discourse. Perhaps they will be, and perhaps they should be. But I suspect that many, and perhaps even most, libertarians will be a bit conflicted about their inclusion in this book, because they will be uncomfortable having their position described as a theory of justice or morality akin to utilitarianism or Kantianism.

Libertarianism, as understood by its modern adherents, is not a theory of morality or justice.²¹ Indeed, it is not really a theory of anything.

¹⁹ JOHN RAWLS, A THEORY OF JUSTICE 4-5 (1971). I have elsewhere said some very unkind things about this methodology. See Gary Lawson, *Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction*, 49 ST. LOUIS U. L.J. 885, 890 (2005); see also Lawson, *supra* note 1, at 779 n. 214. I do not retract any of them.

²⁰ SANDEL, *supra* note 7, at 58-74.

²¹ See Randy E. Barnett, *The Moral Foundations of Modern Libertarianism*, in VARIETIES OF CONSERVATISM IN AMERICA 51, 55 (Peter Berkowitz ed., 2004); David Boaz, *Objectivists and Libertarians*, INDIVIDUAL LIBERTY, FREE MARKETS, AND PEACE, CATO INSTITUTE (Mar. 25, 2011, 5:26 PM), http://www.cato.org/pub_display.php?pub_id=8120.

Libertarianism is a position – a raw conclusion – regarding the appropriate scope of government, which spans the range from none (anarchism) to a nightwatchman state that protects persons and their property against aggressors. There are innumerable theories of justice that different people can and do use to reach positions within that range. The ranks of libertarians prominently include, *inter alia*, large-O-Objectivists, small-o-objectivists, utilitarians, Kantians, religionists, intuitionists, Hobbesians, Hayekians, Rothbardians, Hoppeians, Galambosians, Lefevreians, and a whole passel of various non-Randian natural rights theorists.²² The internal strife among libertarians makes the family squabbles among Marxists, Leninists, Trotskyites, and Maoists look pale by comparison (apart from the small difference that libertarians generally do not kill each other off in droves when they disagree).²³ Ask a group of libertarians about the justice of taxation and you will get uniformity in the conclusion and cacophony in the reasoning.

Nonetheless, libertarians of all stripes will certainly agree that Michael Jordan should get to keep his millions.²⁴ Professor Sandel is right that libertarians, for whatever range of underlying reasons, will readily brush aside redistributionist arguments based on the less-than-absolute nature of taxation (small thefts are still thefts),²⁵ the needs of others (need is not a claim),²⁶ joint action (that's what contracts are for),²⁷ and consent to government (the relevant consent is merely tacit, and tacit consent is roughly ninety-nine parts tacit to one part consent).²⁸ But I do not think that Professor Sandel has accurately captured the likely libertarian response to an argument that he thinks is “less easy to dismiss”²⁹: the argument that Michael Jordan was lucky to be born with skills in demand in a specific culture at a certain point in history so that “it

²² There is not, however, any special libertarian category of “Nozickians.” *But cf.* SANDEL, *supra* note 7, at 62-63 (presenting Nozick’s “philosophical defense of libertarian principles” and “challenge to familiar ideas of distributive justice”). Even before he decided that rent control was a fine idea (at least as long as he was on the receiving end of the check), Robert Nozick was not among the most influential figures within libertarian thought. In my entire life, I have met exactly one libertarian who claimed to have been influenced to any appreciable degree by Nozick. To be clear, I am not criticizing Nozick as a philosopher; his sheer brain power put me to shame, and he had profound and interesting thoughts on every subject that he addressed, from epistemology to Austrian economics. My point is only that, from 1974 onwards, many libertarians have not regarded Nozick as a significant contributor to libertarian thought. He may well be taken more seriously as a libertarian thinker by non-libertarians than by libertarians.

²³ For the classic introduction to the family feuds within libertarianism, see JEROME TUCCILLE, *IT USUALLY BEGINS WITH AYN RAND* (1971).

²⁴ SANDEL, *supra* note 5, at 64-66.

²⁵ *Id.* at 66-67.

²⁶ *Id.* at 67.

²⁷ *Id.* at 67-68.

²⁸ *Id.* at 68.

²⁹ *Id.*

cannot be said that he is morally entitled to keep all the money his talents reap.”³⁰

Professor Sandel posits a libertarian response to this argument premised on self-ownership: “If Jordan is not entitled to the benefits that result from the exercise of his talents, then he doesn’t really own them. And if he doesn’t own his talents and skills, then he doesn’t really own himself.”³¹ That response then serves as a springboard for exploration of the consequences and implications of the self-ownership premise, culminating in the (to some non-libertarians) jarring conclusion that if you allow yourself to be killed and eaten, it is no proper concern of the law.³²

It is quite possible that a number of libertarians would be inclined to make precisely the response that Professor Sandel posits. But I suspect that a much larger number of libertarians would offer a somewhat different response to the luck factor in life, along the lines of: “So what?”

The “Jordan is lucky” objection to letting Jordan keep his money assumes that there is a meaningful connection between luck-independent moral desert and legitimate claims to property. It is true that many libertarians will often emphasize the effort, drive, creativity, and other virtues that go into the process of wealth-generation; Ayn Rand’s novels, for instance, are full of celebrations of the heroic individual and the close connection between character and achievement. But when it comes time to spell out a careful philosophical account of property rights, desert of this kind largely drops out of the picture – for Randians (such as myself) as much as for anyone else. Libertarianism requires a principle of original acquisition combined with a theory of alienability of rightfully acquired items. Assuming that the theory of alienability is packed into the underlying concept of property,³³ the chief weight of libertarianism is borne by the theory of original acquisition. And the dominant theory of original acquisition is a theory of *first possession* that does not depend on the character or deservingness (beyond the fact of first acquisition) of the acquirer but rather on the simple absence of a prior claim by others. A criminal who flees the law, stupidly gets lost, carelessly wanders onto unowned land, negligently ties his shoes together, lets his mind wander while he formulates his next crime, falls into a canyon, and wakes up clutching

³⁰ *Id.* at 69.

³¹ *Id.*

³² *See id.* at 73-74. To a libertarian, the conclusion is not at all jarring; as long as no one’s rights are violated (or imminently about to be violated, if preemptive action is permissible), then of course the law should have nothing to say about it. Whether an idea is jarring is a function of how the idea fits into one’s preexisting normative framework. It says nothing about the idea’s truth or falsity without a prior validation of the framework.

³³ For some of the extensive libertarian writings on transfer of ownership, see Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 291 (1986); N. Stephan Kinsella, *A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability*, 17 J. LIBERTARIAN STUD. 11, 11 (2003).

a loose diamond is the first possessor, and therefore the owner, of the diamond, even though there is no element of desert in his actions.

So why would anyone invoke first possession as a ground for ownership? There is no single answer because there is no single “libertarian” approach to moral issues of justification. Some libertarians argue for first possession based on the nature and function of ownership as a device for resolving social disputes.³⁴ Others see it as a device for addressing broader problems of social organization.³⁵ Still others might ground first possession in essentially economic terms.³⁶ Yet others would argue for first possession on some species of natural rights grounds. A natural rights argument, for instance, would reason that dispossessing the first possessor would require force (literally prying it out of his hands), which violates natural law unless there is some rectificatory justification for the use of force based on some prior or superior claim. And once that basic possessory right is established, it is not a large leap (it is a leap, to be sure, but not a large one) to recognize an abstract ownership right grounded in first possession even when involuntary dispossession could occur without direct violence (by stealth, for example).³⁷ And some argue for first possession on the simple ground that, if it is truly a first possession, there is simply no one in a position to object.³⁸

My point here is not to set out or defend a theory of first possession, but simply to indicate that it is quite possible – and even conventional – to make libertarian arguments for ownership that do not remotely implicate any notion of desert stronger than “you do not have a better claim than I do so leave me alone.”³⁹ Indeed, the prevalence of this kind of position helps explain some

³⁴ See, e.g., HANS-HERMANN HOPPE, A THEORY OF SOCIALISM AND CAPITALISM 19-24 (1989); Stephan Kinsella, *What Libertarianism Is*, LUDWIG VON MISES INST. (Aug. 21, 2009), <http://mises.org/daily/3660>; Stephan Kinsella, *Thoughts on the Latecomer and Homesteading Ideas; or Why the Very Idea of “Ownership” Implies that Only Libertarian Principles Are Justifiable*, MISES ECONOMICS BLOG (Aug. 15, 2007), <http://blog.mises.org/6992/>.

³⁵ See, e.g., RANDY E. BARNETT, THE STRUCTURE OF LIBERTY 68-71 (1999).

³⁶ See, e.g., Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1238 (1979). Professor Epstein, one should note, would not describe himself as a libertarian. But then again, neither Hayek nor Friedman called themselves (or were) libertarians, but that does not diminish their influence within libertarianism.

³⁷ For a very brief version of this kind of argument, see G. E. Morton, *Getting Rights Right: Reply to Van Duffel*, 21 CRITICAL REV. 109, 114-15 (2009).

³⁸ See Edward Feser, *There Is No Such Thing as an Unjust Initial Acquisition*, in NATURAL RIGHTS LIBERALISM FROM LOCKE TO NOZICK 56, 58-59, 66 (Ellen Franken Paul et al. eds., 2005). Professor Feser has since disavowed this argument (and strong libertarianism) on, if I understand him correctly, essentially theological grounds. See Edward Feser, *Reply to Block on Libertarianism Is Unique*, 22 J. LIBERTARIAN STUD. 261, 261-62 (2010). He could still have been right the first time.

³⁹ See, e.g., TIBOR R. MACHAN, INDIVIDUALS AND THEIR RIGHTS 149 (1989) (“The issue is not whether entrepreneurs or capitalists or workers producing and selling deserve what

phenomena that are sometimes puzzling to non-libertarians – for instance, why so many libertarians are hostile to so-called “intellectual property.” You cannot possess ideas or facts and therefore cannot acquire ownership claims to them, no matter how hard you may have worked to grasp the facts or generate the ideas.⁴⁰ First comprehension is not first possession, and for most libertarians, possession is the ground for title.

Notice that none of the arguments that I have identified for first possession assumes or depends upon a prior conception of self-ownership. To be sure, there are important strains within libertarianism that do reason from self-ownership to ownership of things.⁴¹ And because the self-extender will also be the first possessor in a wide range of cases, there is bound to be considerable overlap, and even confusion, between theories premised on first possession and those premised on self-ownership. But there are many libertarians who do not at all employ the self-ownership premise, and indeed there are many who doubt the premise of self-ownership altogether – not because they believe that your self is really owned by others but because they believe that your self is not capable of being owned, even by yourself. The self just is not the sort of entity to which the concept of ownership is applicable.⁴² You can own your things, you can own your land, you can own your body parts, but it does not necessarily follow that you (or anyone else) can own your self, understanding the self as a reasoning and choosing entity. On this view, selling yourself into slavery is not an option because you cannot sell yourself into anything.⁴³ Furthermore, on this view the common-law rule against specifically enforcing personal-service contracts may actually be a sound libertarian rule. You can prescribe all manner of penalties involving transfer of ownership of things for breaking service contracts (essentially making title to things contingent on

they receive. Some do and some don't.”).

⁴⁰ See, e.g., Stephan Kinsella, *The Death Throes of Pro-IP Libertarianism*, LUDWIG VON MISES INST. (July 28, 2010), <http://mises.org/daily/4601>; Roderick T. Long, *The Libertarian Case Against Intellectual Property Rights*, FREE NATION FOUNDATION, <http://www.libertariannation.org/a/f3111.html> (last visited Mar. 20, 2011). Libertarians, of course, are far from unanimous about the pedigree and status of intellectual property; many libertarian-oriented thinkers are strong defenders of some form of such property. See, e.g., Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. PA. L. REV. 2001, 2047-48 (2009).

⁴¹ See, e.g., MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* 33 (1982); Carl Watner, *The Proprietary Theory of Justice in the Libertarian Tradition*, 6 J. LIBERTARIAN STUD. 289, 289-90 (1982); Stephan Kinsella, *How We Come to Own Ourselves*, LUDWIG VON MISES INST. (Sept. 7, 2006), <http://mises.org/daily/2291>.

⁴² See, e.g., MACHAN, *supra* note 39, at 139-40. But see ROTHBARD, *supra* note 41, at 33-34 (arguing that ownership of things is an extension of self-ownership).

⁴³ As with most matters, libertarians are split about whether selling yourself into slavery is possible. In particular, there are libertarians who endorse the concept of self-ownership but maintain that the self is inalienable. See, e.g., Kinsella, *supra* note 33, at 29-30.

your actions), but that does not mean that you can give others an enforceable claim on your future exercises of will.

Again, my point is not that “the” libertarian position is to deny the validity of the concept of self-ownership; indeed, an informal, wildly unscientific e-mail poll of libertarian scholars I conducted suggests strongly that it is *not* a view that is as widely held as I had suspected. But it is certainly *a* libertarian position. There is no necessary link between ownership of things and either moral desert or ownership of self. The lucky owner is still an owner, and the redistributionist who tries to take the lucky owner’s stuff is still an inviting target for a well-placed spring gun.

III. CHEER: THE PRIMACY OF THE GOOD (OR AT LEAST THE NON-PRIMACY OF THE RIGHT)

Professor Sandel concludes his book by suggesting that a sound theory of justice must take account of virtue: “[I]t is not always possible to decide questions of justice and rights without resolving substantive moral questions; and . . . even where it’s possible, it may not be desirable.”⁴⁴ This is perhaps the most important sentence in Professor Sandel’s book. It directly challenges the very prominent tendency in political theory – a tendency shared by Rawls and Nozick alike – to attempt to derive principles of a just social order without committing to a particular view of the good life. It asserts the (epistemological) primacy of the *good* over the *right* by positing that you cannot know what is right without first knowing what is good. My only disagreement with Professor Sandel on this crucial point is that he stops short: it is *never* possible to decide questions of justice without resolving at least basic substantive moral questions about the nature of the human good, so it is irrelevant whether doing so is ever desirable. On this point – to my mind, the most fundamental point in political theory – Professor Sandel is dead-on correct.

Political theory exists because of the need for principles to coordinate the actions of multiple choosing moral agents. There would be neither political nor moral theory in a universe composed entirely of rocks and gas, and there would be no political theory in a universe with one person on a desert island (though there would definitely be moral theory, as that lone person would have to make choices about the appropriate course of conduct). But how can such coordinating principles be validated?

The obvious answer is: choose those principles that best secure the good. If a proposed principle does not, in some fashion, accommodate what moral theory prescribes as the good life for me, I am at a total loss to imagine any reason that will pass the laugh test for why I should give such a principle the time of day. As Tibor Machan has elegantly put it, “[e]thics is conceptually prior to politics, as is metaphysics to epistemology.”⁴⁵ Any claim about how

⁴⁴ SANDEL, *supra* note 7, at 251.

⁴⁵ MACHAN, *supra* note 39, at 29.

“society” ought to be structured *must* be a claim about how *individuals* within that society ought to structure their conduct, since only individuals can act. And any claim addressed to individuals about their conduct that does not invoke the good as the ultimate ground for moral obligation must invoke . . . what? The bad? The ugly? The indifferent? There simply is no credible normative *reason* for action other than pursuit of the good.

That does not mean that there must be a direct line between the good and the right as a matter of political theory. It is quite possible to have a theory of the right that leaves plenty of room for people to pursue the bad rather than the good – if, for example, a sound theory of rights just turns out to yield only a framework within which pursuit of the good is made possible in a social context. But to argue for any conception of rights, even a relatively modest framework conception, on terms other than the good of the people subject to that conception simply makes no sense.

That leaves, of course, the rather difficult question of defining the good. As Ayn Rand so crisply frames the problem: “Good? – by what standard?”⁴⁶ The theory of the good that I think emerges from a sound foundation⁴⁷ is *that which, from the contextual standpoint of a particular individual, best promotes that individual’s distinctive excellence as a human being*. Any theory of the good, in other words, is necessarily egoistic, because it must be addressed to individual persons, who must evaluate and choose as individual agents. It need not, however, be “egoistic” in the crude sense of “whatever I want must be good.” To the contrary, a crucial strain of egoistic theory is eudaimonistic, in which the good for any particular self is an objective fact that must be discovered and cultivated.⁴⁸ Nor does it mean that the *content* of a theory of the good cannot contain other-regarding elements. Indeed, since the context in which all individuals in the real world find themselves is a social context rather than a desert island, a theory of the good *must* take account of the ways in which the presence of other moral agents can help or hinder one’s pursuit of distinctive human excellence. It could very well be that Mother Theresa’s distinctive excellence required her to spend her life in the slums of Calcutta – though, if so, her actions were good *not* because they were other-regarding as

⁴⁶ RAND, *supra* note 8, at 1011.

⁴⁷ What kind of foundation can there possibly be for moral theory? In for a nickel, in for a dime, so . . . Professor Sandel notes that Bentham (and Mill as well, in his widely misunderstood move from the fact of the principle of utility to its value) claimed that the principle of utility was a kind of moral axiom that was presupposed by any attempt to deny it. See SANDEL, *supra* note 7, at 34-35. The utilitarians had the right idea but the wrong principle. The trick is to find that which makes the ethical concept of “value” possible and meaningful. Rand thought that it was “only the concept of ‘Life’ that makes the concept of ‘Value’ possible.” RAND, *supra* note 8, at 1012. I would say “conceptual consciousness” rather than “life,” but given Rand’s understanding of “life,” I doubt whether it makes much difference. In any event, that is the direction that a foundationalist argument might take.

⁴⁸ For a more detailed description of ethical egoism as I understand it, see Lawson, *supra* note 1, at 747-50.

such, but because it was her *own distinctive excellence* to act in such a fashion. Kant, as usual, had it exactly backwards.

CONCLUSION

So how does one move logically from a theory of the good to a theory of the right – from ethics to politics? That is my cue for at least another twenty years of silence on moral and political theory.⁴⁹ But that is the question that a great many thinkers spend a lot of time and energy trying to avoid. Professor Sandel is the rare exception who sees the need to face the question head-on, and for that he deserves enormous credit.

⁴⁹ For whatever it is worth, the shape of the answer that I would give were I ever to speak again is best described in the neo-Aristotelian (their description), neo-Randian (my description) analysis of DOUGLAS B. RASMUSSEN & DOUGLAS J. DEN UYL, *NORMS OF LIBERTY* 265-83 (2005).